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IN THE
COURT OF APPEALS OF INDIANA

ROBERT SCHUTZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0701-CR-20
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald Daniel, Judge
Cause No. 79C01-0601-MR-1

August 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a guilty plea, Robert Schutz appeals his sentence for murder[1] and criminal deviate conduct[2] as a Class A felony. On appeal he raises the following restated issues:

I. Whether it was improper under the actual evidence test of Article 1, Section 14 of the Indiana Constitution for the trial court to sentence Schutz for murder and elevate his criminal deviate conduct to a Class A felony based on the same factual circumstances.

II. Whether the trial court erred in sentencing Schutz to an aggravated sentence of forty-eight years for criminal deviate conduct when that sentence was ordered to run consecutively to his sentence for murder.

III. Whether Schutz's sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 2, 2006, Schutz went to the Tippecanoe County residence of his ex-girlfriend, Tina. The two began arguing after Tina informed Schutz that she was moving in with another man. Schutz beat her and stabbed her multiple times. While Tina was dying, Schutz forced her to repeatedly submit to anal sex.

The State filed a ten-count information charging Schutz with murder, felony murder, three counts of criminal deviate conduct, each as a Class A felony, criminal confinement while armed with a deadly weapon as a Class B felony, criminal confinement resulting in serious bodily injury as a Class B felony, aggravated battery as a Class B felony, battery committed by means of a deadly weapon as a Class C felony, and battery resulting in serious bodily injury as a Class C felony.

[1] *See* IC 35-42-1-1(1).

On February 28, 2006, Schutz signed a plea agreement in which he agreed to plead guilty but mentally ill to murder and to one count of criminal deviate conduct as a Class A felony. In exchange, the State agreed to dismiss the remaining eight charges. Sentencing was left to the court's discretion. Schutz waived notice of aggravating circumstances and his right to have a jury decide those circumstances. On March 3, 2006, the trial court held a plea hearing, took the plea under advisement until the sentencing hearing, and set the matter for sentencing.

On April 24, 2006, the trial court accepted Schutz's plea and sentenced him to sixty-two years for murder and forty-eight years for criminal deviate conduct to be served consecutively to the murder conviction for an aggregate sentence of 110 years. Schutz now appeals. Additional facts will be added as needed.

DISCUSSION AND DECISION

I. Double Jeopardy

Schutz first contends that the trial court erred in sentencing him for criminal deviate conduct as a Class A felony while also sentencing him for murder. Specifically, Schutz contends that elevating his charge of criminal deviate conduct to a Class A felony based on the same factual circumstances that proved the murder charge, i.e. the serious bodily injury of Tina, constituted double jeopardy under Article 1, Section 14 of the Indiana Constitution.[3]

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[2] *See* IC 35-42-4-2(b)(1).

[3] Schutz is before us on a direct appeal challenging the propriety of a plea agreement, not on appeal from the denial of post-conviction relief. In *Mapp v. State*, our Supreme Court reiterated our long-standing rule that a direct appeal is not the proper procedural avenue for a defendant to attack a plea agreement. 770 N.E.2d 332, 333 (Ind. 2002). However, following the reasoning of our Supreme Court in *Mapp*, we elect to address the claim on the merits. *Id*.

Schutz has waived his right to challenge his conviction of this Class A felony on double jeopardy grounds. *Mapp v. State*, 770 N.E.2d 332, 333 (Ind. 2002); *O'Connor v. State*, 789 N.E.2d 504, 511 (Ind. Ct. App. 2003). Our supreme court has held that voluntarily accepting the terms of a plea agreement results in the waiver of double jeopardy claims arising from the sentence imposed. *Kincaid v. State*, 778 N.E.2d 789, 792 (Ind. 2002).

> Plea bargaining is a tool used by both prosecutors and defendants to expedite the trial process. Defendants waive a whole panoply of rights by voluntarily pleading guilty. These include the right to a jury trial, the right against self-incrimination, the right of appeal, and the right to attack collaterally one's plea based on double jeopardy.

Mapp, 770 N.E.2d at 334-35 (footnote omitted) (citing IC 35-35-1-2(a)(2); *Games v. State*, 743 N.E.2d 1132, 1135 (Ind. 2001) ("Defendants who plead guilty to achieve favorable outcomes in the process of bargaining give up a plethora of substantive claims and procedural rights.")).

Our Supreme Court has further held that "a defendant with adequate counsel who enters a plea agreement to achieve an advantageous position must keep the bargain. Once the defendant bargains for a reduced charge, he cannot then challenge the sentence on double jeopardy grounds." *Games*, 743 N.E.2d at 1135. The Court has noted, "retaining a benefit while relieving oneself of the burden of the plea agreement 'would operate as a fraud upon the court.'" *Id.* (quoting *Spivey v. State*, 553 N.E.2d 508, 509 (Ind. Ct. App. 1990) (citation omitted)).

Here, Schutz entered into a plea agreement to plead guilty to murder and one Class A felony. Schutz received a significant benefit by entering into this agreement because, in exchange for his plea, the State agreed to dismiss eight other counts, including two Class A

felonies, three Class B felonies, and two Class C felonies. To accept Schutz's argument of double jeopardy would permit him to retain the benefit of having eight charges dismissed while also having his Class A felony criminal deviate conduct conviction reduced to a Class B felony.[4] Schutz received an advantage through the bargain and cannot now challenge his convictions based upon double jeopardy. *See O'Connor v. State*, 789 N.E.2d 504, 511 (Ind. Ct. App. 2003). To hold otherwise would deprive both the prosecutor and defendant of the ability to make precisely the kind of bargain that was made here. *Mapp*, 770 N.E.2d at 335.

II. Consecutive Sentences

Schutz next challenges his sentence of 110 years, arguing that sixty-two years for murder enhanced by forty-eight years for criminal deviate conduct violates IC 35-50-2-1.3,[5]

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[4] The range of sentencing for a Class A felony is twenty to fifty years with the advisory being thirty, while the range of sentencing for a Class B felony is six to twenty years with the advisory being ten. IC 35-50-2-4, -5.

[5] IC 35-50-2-1.3 provides:

> (a) For purposes of sections 3 through 7 of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.
>
> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
>
> (c) In imposing:
>
> (1) consecutive sentences in accordance with IC 35-50-1-2;
>
> (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
>
> (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
>
> a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense. (Emphasis added).

the advisory sentencing statute. Citing only to *Robertson v. State,* 860 N.E.2d 621 (Ind. Ct. App. 2007), *trans. granted*,[6] Schutz argues that the "advisory sentence must be used if the subsequent sentence is to be served consecutively." *Appellant's Br*. at 10. As such, Schutz contends that his combined sentence of 110-years must be reduced to ninety-two years -- comprised of sixty-two years for murder plus thirty years, the advisory sentence for criminal deviate conduct as a Class A felony.[7] Schutz's argument highlights what, until recently, was a split of authority on our court.

In addressing his argument, Schutz quotes extensively from *Robertson*, but undertakes no analysis of that case or its holding. In light of our Supreme Court's recent decision in *Robertson v. State*, No. 49S05-0704-CR-152, 2007 WL 2258260 (Ind. Aug. 8, 2007), in which the Supreme Court overturned the precedent on which Schutz relies, we find that Schutz's sentence does not violate IC 35-50-2-1.3. The trial court had the discretion to impose an enhanced sentence of forty-eight years for the criminal deviate conduct conviction and to order that sentence to run consecutively to the murder sentence. *See Robertson*, 2007 WL 2258260, at *5.

III. Appropriateness of Sentence

"The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the

[6] Schutz's brief was filed approximately three weeks before our Supreme Court granted transfer in *Robertson*.

[7] Schutz further argues that, in light of double jeopardy concerns, the criminal deviate conduct should have been reduced to a Class B felony, which would have carried an advisory sentence of ten years. *Appellant's App.* at 17. Having found no double jeopardy violation, we discuss the appropriate sentence for Schutz's conviction of murder and criminal deviate conduct as a Class A felony.

nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). Here, Schutz contends that his sentence is inappropriate. We disagree.

During the sentencing hearing, Detective Cecil Johnson of the Lafayette Police Department made the following comments:

> [I]n my seventeen years as a police officer this is the worst brutal, torture murder I have been involved in as an investigator. Mr. Schutz stabbed and cut [Tina] over twenty times in her body. He stabbed her and cut her in the eyes, face, throat, abdomen, head at one point tried to cut off her left ear and Mr. Schutz's own words as [Tina] was dying in her kitchen floor that wasn't enough for him. He had to remove her pants and sodomize [Tina] as she laid [sic] there and begged him not to do that. And in his own words (inaudible) voice as she lied there dying. During the interview with Mr. Schutz he showed no true remorse to me . . . it was a two day interview. . . . Parts of it he would laugh. At times he seemed sad but for the most part there wasn't [] true remorse.

Tr. at 60.

Detective Johnson also testified that J.B., a prisoner who was locked up with Schutz, contacted the detective requesting to speak with someone about the case. The two men talked by telephone, and J.B. explained that, while in prison with Schutz, Schutz gave him details about the crime that made J.B. sick to his stomach. J.B. reported that even two weeks after the murder, Schutz said, "he was glad that he killed that bitch." *Id*. at 61. J.B. asked for nothing and was given nothing for his statements. Detective Johnson asked the trial court to impose the maximum sentence, and explained that in his seventeen years of police work he had only requested the maximum sentence on one other occasion. *Id*.

The State recognized that Schutz received a traumatic brain injury when he was seventeen, and that this was the basis for the plea of guilty but mentally ill. However, the

State recognized that this brain injury did not diminish Schutz's ability to understand his actions. As support for this conclusion, the State cited the comments of forensic psychologist Jeffrey Wendt, who noted, "despite his mental disease or defect he understood that what he did was wrong." *Appellant's App.* at 68. The State reminded the court that, on the day of the crime, Schutz was on probation and was under a court order to have no contact with Tina. The State further stated that after Schutz killed Tina, he remained at her home to drink her liquor and sleep in her bed.

Prior to sentencing, the trial court commented to Schutz about:

> [t]his astonishingly violent crime. This crime that clearly was a result of your intention to punish the victim to make her suffer as much as you possibly could. Other than a few cases that I've seen that involve children this is the most despicable act I've seen in my thirty plus years with the practice of law. Your actions and repeatedly stabbing her particularly stabbing her in both eyes, trying to cut her ear off, the anal rape as she was dying.

Appellant's App. at 72. We cannot say the sentence is clearly inappropriate in light of the nature of the offense.

As to the character of the offender, while again noting that Schutz had a brain injury, the evidence revealed that Schutz had significant substance abuse problems that predated the injury. *Id*. at 69. In his pre-sentence report, Schutz listed his leisure activities as "enjoys drinking, smoking, and 'like[s] to having sex.'" *Appellant's App.* (Green Volume) at 7. Schutz sold his monthly allotment of food stamps to "get booze." *Id*. The State noted: "He's never really ever held a job. He's a manipulator and he's lazy and he was mooching off Tina and who knows who else. He was a user, again . . . there's no indication of any remorse . . . ." *Appellant's App.* at 69. As for Schutz's expedited guilty plea, a factor that

Schutz cites to warrant a lesser sentence, we find Schutz received substantial benefit when the trial court dismissed the remaining eight charges. We also cannot say that the sentence is clearly inappropriate in light of the character of the offender.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.